

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Nondiscrimination in the Distribution of
Interactive Television Services Over Cable

)
)
)
)
)
)

CS Docket No. 01-7

TO: The Commission

**REPLY COMMENTS OF
GEMSTAR-TV GUIDE INTERNATIONAL, INC.**

The comments filed in this proceeding establish both (1) the critical importance of protecting interactive television (“ITV”) services, including electronic program guides (“EPGs”) and their related services, from discriminatory interference by multichannel video programming distributors (“MVPDs”) and (2) the Commission’s ample authority to adopt measures to prevent ITV discrimination. Gemstar-TV Guide International, Inc. (“Gemstar”) submits these reply comments to support both of these propositions.

Gemstar urges the Commission to initiate a rulemaking and ultimately to adopt rules to ensure that MVPD subscribers have access to the full complement of ITV services offered in connection with the video programming carried on their multichannel video programming systems. MVPDs have a strong incentive to favor the ITV content and services offered in connection with their own affiliated programming while preventing or interfering with the delivery of ITV services offered in connection with competing programming. Indeed, elements of the cable industry have made clear in this very proceeding that they can and will engage in precisely that behavior. If MVPDs are not prevented from engaging in such anti-

competitive discrimination, competing programmers will be unable to offer – and subscribers will be unable to take advantage of – the ITV enhancements developed for their programming. MVPDs, simply by virtue of their ability to control the delivery of essential ITV components rather than by virtue of the quality of their offerings, will come to dominate the provision of content in the nascent interactive television market.

I. PROTECTING ELECTRONIC PROGRAM GUIDES FROM DISCRIMINATORY TREATMENT IS CRITICAL TO THE SUCCESS OF INTERACTIVE TELEVISION.

Gemstar's initial comments described some of its own ITV plans and some of the services that its advanced electronic program guides will enable and explained why those ITV services must be protected from discrimination by cable and other ITV platform providers capable of controlling the delivery of essential ITV components.¹ Other comments filed in this proceeding describe the essential role that EPGs of the kind Gemstar will be offering will play in the interactive television marketplace. The comments also highlight the critical need for rules preventing MVPDs from exercising gatekeeper control over the content and quality of ITV services (including EPG services) available to their subscribers.

As the National Association of Broadcasters ("NAB") notes, EPGs will play an increasingly important role in a digital world dependent on devices that can organize and integrate the video, audio and data components that will make up ITV services.² There is no doubt that, as this central function becomes clearer, cable operators and other MVPDs will have

¹ See Comments of Gemstar-TV Guide International, Inc., *In re Nondiscrimination in the Distribution of Interactive Television Services Over Cable*, CS Docket No. 01-7, at 3-5 (Mar. 19, 2001) ("*Gemstar Comments*").

² See Comments of the National Association of Broadcasters, *In re Nondiscrimination in the Distribution of Interactive Television Services Over Cable*, CS Docket No. 01-7, at 24-29 (Mar. 19, 2001) ("*NAB Comments*").

growing incentives and opportunities to develop and use their own EPGs in order to make it more difficult for subscribers to access unaffiliated interactive television content and services.³ Of course, there is no reason why cable operators and other MVPDs should not develop and deploy their own EPGs as well as other ITV content or services. Consumers ultimately will benefit from having EPGs – and a full range of ITV content and services – available from their MVPDs *and* from independent sources. It is, after all, the consumer's ability to select from among multiple competing products that ultimately should determine the winners and losers in this nascent industry.

The Commission's intervention is required, however, because cable operators are likely to impede the distribution of competing EPGs and other ITV content to their subscribers while exploiting their control over their own EPG to favor their own programming and ITV content and services. Gemstar has provided evidence from its own experience that underscores the lengths to which some cable system operators have gone to prevent meaningful competition and maintain control over the EPGs their subscribers receive.⁴

To address this problem, the *NAB Comments* urge the Commission to adopt rules prohibiting cable operators from constructing their own EPGs in a manner that discriminates against unaffiliated ITV providers.⁵ Gemstar seeks rules that similarly will protect the interests of ITV providers not affiliated with cable system operators – by prohibiting cable operators (and other MVPDs offering affiliated ITV content) from interfering with the delivery of independent

³ See *NAB Comments* at 25-29.

⁴ See *Gemstar Comments* at 1, 5.

⁵ See *NAB Comments* at 25-29.

EPGs whose providers lack the MVPD's incentive to discriminate in the delivery or presentation of ITV content and services.

The cable industry's comments themselves reveal the pressing need for the Commission to adopt measures of the kind we propose. Although AT&T and the National Cable Television Association ("NCTA") pay lip service to the contention that cable operators will voluntarily offer subscribers a variety of affiliated and unaffiliated ITV services,⁶ it is apparent throughout the industry's comments that, in the absence of nondiscrimination requirements, cable operators plan to exercise gatekeeper control over the content of ITV services delivered over their systems and to favor their own content. For example, Cablevision insists that it must have complete control over "the selection of ITV content and applications . . . provided over [its] network[]" and must be permitted to limit the ITV services available to its subscribers to those services developed by its own "ITV technology, content and applications partners."⁷ Similarly, NCTA, speaking on behalf of the entire industry, asserts that cable operators must have the right to strip or otherwise destroy the functionality of "triggers" in programming carried on their

⁶ See Comments of AT&T Corp., *In re Nondiscrimination in the Distribution of Interactive Television Services Over Cable*, CS Docket No. 01-7, at 27 (Mar. 19, 2001) ("AT&T Comments"); Comments of the National Cable Television Association, *In re Nondiscrimination in the Distribution of Interactive Television Services Over Cable*, CS Docket No. 01-7, at 5 (Mar. 19, 2001) ("NCTA Comments").

⁷ See Comments of Cablevision Systems Corporation, *In re Nondiscrimination in the Distribution of Interactive Television Services Over Cable*, CS Docket No. 01-7, at 11, 13 (Mar. 19, 2001). Although there may, in some circumstances, be technical and other issues that need to be resolved to enable the seamless cable transmission of ITV services, we believe that those issues – whose complexity Cablevision overstates – can and must be resolved satisfactorily to promote the public's interest in access to diverse programming and services from a multiplicity of sources. In fact, it is precisely those sorts of technical and other issues that the Commission can and should address in the full rulemaking Gemstar urges the Commission to undertake. The fact that such issues exist is reason to *conduct* a full rulemaking, not to foreclose it.

systems: “[O]perators may wish to keep screens clear of triggers on some types of channels to avoid the clutter or over-commercialization of services.”⁸

But those decisions are rightfully those of the consumer, not the gatekeeper platform provider. Just as they traditionally have made choices among the video programming carried by their MVPDs, if consumers dislike particular ITV content or the manner in which it is presented, they can decline to access or interact with the content, and the ITV provider or service will fail as a competitor in the marketplace. But the ITV provider will never have an opportunity to discover whether elements of its service are attractive to viewers in the first place if the cable operator is free unilaterally to strip the content (or triggers necessary to access the content) from its system based the operator’s own subjective – and biased – assessment.

The NCTA’s extraordinary assertion of a right to control ITV triggers is particularly troubling because triggers are the critical elements that launch ITV content and link the content to the appropriate related video programming. In fact, triggers transmitted with related video programming are essential even to those ITV services that otherwise occupy virtually no cable system capacity. Gemstar has described its own plans for offering services of this kind,⁹ and it is reasonable to assume that others will similarly create ITV content that, by agreement with the applicable program providers, is keyed off of triggers embedded in video programming but distributed through two-way services that do not necessarily depend for their delivery on cable bandwidth or a cable-provided set-top box.

⁸ *NCTA Comments*, at 49.

⁹ *See Gemstar Comments*, at 3-5.

The cable operator's elimination of such triggers from the programming carried on its system would destroy the ability of virtually all non-cable-affiliated ITV providers to compete against cable-controlled content. The cable industry's insistence on the prerogative to engage in precisely this behavior thus puts the Commission and all entrants into the nascent ITV market on notice: *In the absence of Commission action to prevent MVPDs from discriminating against unaffiliated providers of ITV services (including EPGs), MVPD discrimination will be inevitable.*

II. THE COMMISSION HAS JURISDICTION, PURSUANT TO ITS STATUTORY MANDATE TO ASSURE THE COMMERCIAL AVAILABILITY OF NAVIGATION DEVICES, TO PROHIBIT DISCRIMINATION AGAINST INTERACTIVE TELEVISION SERVICES RELATED TO PROGRAMMING OFFERED OVER MULTICHANNEL VIDEO PROGRAMMING SYSTEMS.

We believe it essential that the Commission propose and adopt rules to prohibit MVPDs that also offer ITV services (including EPGs) from discriminating against ITV services offered in connection with non-MVPD-affiliated programming. The Commission clearly has the authority to do so. There is, as the Consumer Electronics Retailers Coalition notes, "significant overlap" between the issues raised here and in the Commission's *Navigation Devices Proceeding*.¹⁰ Indeed, the statutory provision underlying the *Navigation Devices Proceeding*, among other sources of jurisdiction, affords the Commission ample authority to adopt the ITV nondiscrimination provisions contemplated in this proceeding.

¹⁰ Comments of the Consumer Electronics Retailers Coalition, *In re Nondiscrimination in the Distribution of Interactive Television Services Over Cable*, CS Docket No. 01-7, at 2 (Mar. 19, 2001).

Section 629 of the Communications Act provides:

The Commission shall, in consultation with appropriate industry standard-setting organizations, adopt regulations to assure the commercial availability, to consumers of multichannel video programming *and other services* offered over multichannel video programming systems, of converter boxes, *interactive communications equipment*, and other equipment used by consumers to access multichannel video programming *and other services* offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor.¹¹

The Commission has adopted baseline rules intended to implement this statutory mandate,¹² but it continues to monitor the market for “navigation devices” and acknowledges that additional rules may be necessary to satisfy the statutory mandate.¹³

The goal of Section 629, on its face, is to assure that consumers are able to purchase at retail (rather than solely from the monopoly cable provider) equipment used to access video programming *and other services* offered over cable and other multichannel video programming systems. The equipment covered clearly includes EPG devices, which are specifically designed to facilitate program navigation, and other “interactive communications” equipment. However, it is obvious that the goal of creating a commercially viable retail market for competitive equipment cannot be accomplished without some assurance that cable operators will not interfere with the services that the equipment is intended to access and offer.

¹¹ 47 U.S.C. § 549 (emphasis added).

¹² See *In re Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80 (“*Navigation Devices Proceeding*”), Report and Order, 13 FCC Rcd 14775 (1998); Order on Reconsideration, 14 FCC Rcd 7596 (1999).

¹³ See *Navigation Devices Proceeding*, Further Notice of Proposed Rulemaking and Declaratory Ruling, 15 FCC Rcd 18199 (2000).

Because consumers are accustomed to obtaining set-top boxes from their monopoly cable provider, unaffiliated manufacturers and vendors already face a steep challenge in attempting to attract consumers to new equipment from a different source. The ability of these equipment providers to compete will clearly depend on whether they are able to offer user-friendly devices that incorporate advanced features – including advanced EPG and ITV services – that are not yet available from the cable operator or are superior to cable offerings. For the devices to function properly in delivering these services, however, they must be able to access the related content and “triggers” delivered with the television programming they are designed to access. If cable operators are free to interfere with this content, a requirement that they permit subscribers to attach competitive devices to their systems will be of little utility; consumers will be unwilling to purchase the devices and the competitive market will wither before it ever has a chance to flourish.¹⁴

Thus, the statutory mandate imposed on the Commission by Section 629 cannot be accomplished without protecting ITV content and services delivered over multichannel video programming systems to which the competitive devices attach. Accordingly, the nondiscrimination provisions contemplated in this proceeding fall within the Commission’s authority – indeed, obligation – to adopt rules assuring the commercial availability of navigation devices used to access the full range of programming and services offered over multichannel video programming systems.

¹⁴ See, e.g., Comments of Gemstar-TV Guide International, Inc. and Gemstar Development Corp. in Response to Further Notice of Proposed Rulemaking, *Navigation Devices Proceeding*, CS Docket No. 97-80 (Nov. 15, 2000).

Given the jurisdictional authority granted by Section 629, the Commission need not concern itself with the cable industry's argument that Section 624(f) of the Communications Act precludes the Commission from regulating ITV.¹⁵ Section 624(f) provides: "Any Federal agency, State, or local franchising authority may not impose requirements regarding the provision or content of cable services, *except as expressly provided in this title [Title VI]*."¹⁶ Section 629, which is part of Title VI, contains an express grant of authority that encompasses regulations regarding the "provision . . . of cable services." Therefore, regulation of ITV services falls within the exception in Section 624(f) at least to the extent that it prevents discrimination that will interfere with the development of a retail market for non-cable-affiliated navigation devices.

¹⁵ See, e.g., *NCTA Comments* at 45-47; *AT&T Comments* at 35-38.

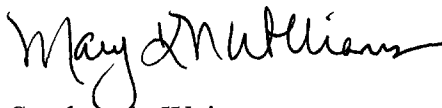
¹⁶ 47 U.S.C. § 544(f)(1) (emphasis added).

CONCLUSION

For the foregoing reasons, Gemstar urges the Commission to initiate a rulemaking to propose and adopt rules that will (1) further its statutory mandate to assure the commercial availability of competitive navigation devices and (2) promote the public interest in the availability of diverse products and services from a multiplicity of sources. Specifically, the Commission should initiate a rulemaking proposing to adopt a nondiscrimination principle that will protect consumers from being deprived of access to a full range of interactive television services, including independent electronic program guides, available to them.

Respectfully submitted,

GEMSTAR-TV GUIDE INTERNATIONAL, INC.



Stephen A. Weiswasser
Mary Newcomer Williams
COVINGTON & BURLING
1201 Pennsylvania Avenue NW
Washington, DC 20004-2401
Tel.: 202-662-6000
Fax: 202-662-6291

Its Attorneys

Dated: May 11, 2001